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OFFICE-SUPREME COURT, U.S.
FILED
MAY 20 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 893

MANHATTAN FRUIT EXPORT CORPORATION,
Petitioner,

against

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the District Court is reported at 175 F. Supp. 771 and that of the Court of Appeals at 271 F. 2d 607.

Questions Presented

Questions 1, 2 and 4 set forth on page 2 of the petition do not arise in this case. Question 3 poses a narrow issue of fact of consequence only to the litigants herein. The Court of Appeals decided question 3 correctly.

Statement

Manhattan Fruit Export Corporation, a shipper of plums on respondent's vessel, petitions for review on writ of certiorari of the unanimous decision of the Court of Appeals which rejected as clearly erroneous the District Court's finding of fact that respondent had failed properly to refrigerate the plums, and reversed the District Court judgment which had awarded petitioner damages of $3,796.92.

Argument

Question 1 posed by the petition asks whether respondent's records (Df. Exs. F-1, F-2, A. 67, 69, R. 577-579),* recording bi-hourly throughout the voyage temperatures maintained within the chamber where the plums were stowed, are "admissible in evidence over objection" as business records under 28 U. S. C. § 1732.

Petitioner did not interpose any objection to the admissibility of these records in the Courts below and, we submit, may not now seek review on this basis. *United States* v. *Fillebrown*, 32 U. S. 28, 47; *Schuchardt* v. *Allens*, 68 U. S. 359, 367.

But they were properly admitted. Chief Mate Vermeulen testified by deposition that it was the practice of the vessel to keep temperature records during this voyage and others (R. 577); that such records were "always" made (R. 577); and identified the records which petitioner now claims were inadmissible as the "official records" of the temperatures experienced in the reefer compartment in which these plums were stowed (R. 577-579). He identified the signatures of the master and chief engineer appearing thereon (R. 578). Plaintiff's Exhibit 33 (A. 62-63, R. 191) explains the regular procedure pursuant to which these records were prepared from contemporaneous rough sheets upon which the temperatures in the chamber were taken down every two hours, with the rough sheets then being discarded.

Thus the records which were produced are not "claimed to have been manually copied from destroyed original records". They are the records.

As the Court of Appeals pointed out by way of dictum: "There can of course be no doubt as to the competency

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* R. refers to page of the record certified to the Court of Appeals by the District Court. A. refers to page of the printed appendix to defendant-appellant's brief in the Court of Appeals.

under § 1732, Title 28, U. S. Code, of documents prepared as these were." (271 F. 2d 607, 608, 609.)

Questions 2 and 4 both ask whether temperature records alone are sufficient proof that a carrier has been free of neglect in respect of refrigerator cargo.

At the trial respondent introduced proof that the plums were stowed in the No. 4 starboard 'tween-deck reefer (daily loading list, Df. Exs. C-1, C-2, R. 205, 570; dock receipt, Df. Ex. D, R. 206, 571; and stowage plan, Df. Ex. E, R. 207, 574) which has a tonnage capacity of about 60 tons (A. 31), but on this voyage only contained about 27 tons of cargo, leaving ample space for air circulation (A. 31). The boxes of plums were stowed brick fashion, leaving a space between the ends of the boxes for air circulation (A. 31). Small dunnage was placed between the tiers for the same purpose (A. 31-32). This was proper stowage (A. 33). There was further testimony that the No. 4 reefer was cooled by coils through which freon gas was circulated (A. 35), was equipped with ventilating fans which circulated the air (A. 35), and that the air in the box was replaced twice daily by an exhaust fan (A. 36). A plan of the compartment was produced in evidence (Df. Ex. K, R. 253), showing the location of the thermometer bulb from which the temperature readings were taken to be on the ceiling of the chamber about four feet from the forward bulkhead and thirty feet above the floor of the box (R. 249). This was a proper location (R. 250).

All of this was in addition to the temperature logs. Patently, therefore, the question of sufficiency of the temperature charts alone is not presented on this record.

By question 3 petitioner asks this Court to grant review to decide whether the fact-findings of the District Court as to refrigeration are so clearly erroneous as to warrant reversal by the Court of Appeals.

The District Court condemned respondent because the temperature records showed that temperatures in excess of 41° F. existed in the reefer on September 29, 1953 (A. 79). Yet this was one day before the plums were delivered to respondent (R. 82).

The District Court found that the temperature records showed 41° F. to have been exceeded in the reefer on October 2, 1953 (A. 79). But the highest temperature recorded on that day was 3½° C., which is slightly under 39° F.

The District Court ignored the inference of reliability of the temperature records for No. 4 reefer stemming from the fact that identical records for No. 3 (Pl. Ex. 35, A. 65, R. 191) accurately reflected the higher and improper temperatures there maintained (A. 79).

None of the aforesaid findings of fact of the District Court was supported by any evidence. The evidence against them was uncontradicted and unimpeached. Accordingly, the Court of Appeals found them clearly erroneous and reversed. In so doing that Court did not raise "an important question of Federal law in conflict with the decisions of this Court", as stated in the petition.

CONCLUSION

For the foregoing reasons we submit that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

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